

TOBIN ET. AL. vs. MERRITT ET. AL.\*

Counsel for Plaintiffs *Burns & Blake*, and for the Defendants the *Hon. W. H. Draper*, the *Hon. Robert Baldwin* the *Hon. H. J. Boulton*, the *Hon. R. B. Sullivan*, *Mr. Turner*, *Mr. Esten*, and others.

This action was brought under peculiar circumstances, which have been unfolded in other cases before the Courts, amongst which are the following :—

On the 28th August, 1839, an agreement was executed between Merritt, Adams, Mittleberger, and Benham, whereby Mittleberger undertook the management of the Mills and other affairs of Merritt & Adams, as proprietors of the Welland Canal Mills, uniting it with the business in which he had been engaged for many years.

Merritt and Adams undertook to furnish adequate capital and credit to carry on this business, and in default thereof, Mittleberger was at liberty to cancel the agreement : their inability to perform this branch of their agreement soon arose, to the great damage of Mittleberger, who, for this reason, gave notice to Merritt, early in November, 1839, that he should dissolve the connexion, because they had failed to perform the most important part of their agreement, being so much involved and in default, their credit was exhausted.

Merritt & Adams being thus indebted to the Banks and elsewhere, and being pressed for immediate payment of bills, they were unable to retire. Mittleberger was prevailed upon to procure advances to enable him to pay the debts of Merritt & Adams, so as to relieve them and their endorsers from embarrassment, and an arrangement was made with Messrs. Tobin & Murison, on condition of security being furnished by Merritt & Adams (Mittleberger to be held liable that they would perform their engagements to pay Tobin & Murison). Sureties were provided, and Mittleberger paid the debts referred to, which Merritt & Adams bound themselves to repay on the 15th July, 1842, the connexion was not, therefore, dissolved.

Merritt & Adams were further bound to Mittleberger under a penalty of £16,000, that if losses should arise from the business, they would pay him a proportion of two-thirds of such losses ; other particulars of the agreements are set forth in the judgements.

In closing up the affairs of John Mittleberger & Co. it was found losses had been incurred, and that, separate from their shares of such losses, Merritt & Adams were indebted to the firm of John Mittleberger & Co. in balances exceeding £7,000, in February, 1843.

\* In opening the accompanying papers for public perusal, the chief object is to correct misrepresentations which have been sent abroad touching the subject treated upon, and it is believed the most adroit means of attaining this object with brevity and effect, is to rely upon the Judgments of the presiding Judges of the highest legal tribunal in the Province, as delivered in Term, after having had the whole question of litigation before them in various forms at Law, and in the Courts of Appeal, for nearly two years, during which time, all the art, quibbling, and sophistry were employed, which some six or more of the most eminent Counsel and Attornies of the Province could devise and urge in support of the Defendants.

It has been deemed necessary to introduce the Report of the case with a brief reference to circumstances out of which the action arose, in order to familiarize the reader with the questions at issue. These papers are addressed to reason, common sense, and justice, not to passion or prejudice.

July, 1845.

These sums Mittleberger called upon Merritt & Adams to pay to him, or to Tobin & Murison, on account of his firm, and, on the losses being defined, to provide like payment or sureties for their proportions, on any terms they could arrange with Tobin & Murison.

Merritt & Adams refused providing either payment or security, hence actions were necessarily brought by Mittleberger.

After these prosecutions, a compromise was attempted and failed. Subsequently a basis of settlement was stated by Mittleberger and adopted by Merritt but declined by Adams. This was reduced to a provisional agreement in July, 1843.

Merritt did not complete the settlement and subsequently abandoned it, and raised some legal questions out of it as the foundation of adverse proceedings in Chancery.

The original actions were, therefore, revived for the approaching Assizes, but were stayed by an Injunction issued by the Vice Chancellor (*ex parte*), without a hearing on the part of Mittleberger, the first knowledge of such adverse proceedings being the service of Injunctions on his Counsel the day before the entry of suits on the Assize Docket.

In appeal, these Injunctions were dissolved previous to the next Spring Assizes, at which these actions were brought to trial. The defence was then raised on the part of Merritt, that *being partners under the construction of the agreements, Mittleberger could not prosecute Merritt at Common Law*, and this position was upheld.

Merritt having thus taken his stand upon the legal construction of the agreements and obligations existing between the parties, and resisted all claims upon him (although admitted to be correct as to amount), this action was brought before the Assizes of October, 1844, and a special verdict taken, subject to the opinion of the Judges in Term, as to stated points of Law, and decided against Merritt in February, 1845, as follows:—

(*From the Upper Canada Jurist, Vol. 2, No. 1, June, 1845.*)

## SITTINGS AFTER EASTER TERM, 8 VIC.

### QUESTION OF PARTNERSHIP.

This case was argued at great length last Term by *Burns* and *Blake* for the plaintiffs, and

*R. B. Sullivan*, for the defendants.

## JUDGEMENTS

BY CHIEF JUSTICE ROBINSON.—The point submitted to the judgment of this court, upon the special verdict which has been consented to by the parties, is, whether during the course of certain transactions between the plaintiffs and Messrs. John Mittleberger & Co., set forth in the special verdict, the defendant Merritt, was or was not a partner in the firm of John Mittleberger & Co., and as such partner, liable to be charged with monies advanced by the plaintiffs during that period, to John Mittleberger & Co., for carrying on the business of the firm. If the defendant Merritt was not so liable, then a verdict is to be entered for the defendants; if he was and is liable to be so charged, then a verdict is to be entered for the plaintiffs, for £25,918 10s. 6d., subject to the opinion of this court, upon the propriety of deducting therefrom the sum of £2,293 17s. 11d., upon the facts stated in the verdict. The defendant

Merritt, and Mr. Adams, now deceased, were owners, in different proportions, of mills upon the Welland Canal, near St. Catharines, in which they had been for some time carrying on business; and in August, 1839, they leased the mills with other premises and appurtenances, to *John Mittleberger* and one Benham, who is now absent from the province, for three years, and, at the same time, they entered into an agreement with Mittleberger and Benham, very special in its nature, with the terms of which the court, as well as the counsel on both sides, have become familiar, from its connection with other proceedings which have been before us; and, as the agreement is transcribed in full in the special verdict, I need not state its contents further than may be necessary for showing the grounds of our judgement. It recited that John Mittleberger and Bonham, intended to carry on business, at the mills so leased to them, under the name of "*John Mittleberger & Co.*," for the term of three years, unless the period should be lessened by death, or other contingency. Merritt and Adams by it assigned, also, to *J. Mittleberger and Benham*, all their stock in trade, produce and effects belonging to the mill, a schedule of which was annexed. Mittleberger was empowered to sue for, and receive, all debts due to Merritt and Adams in their former business at the mill, and certain accruing rents, crediting what should be received to Merritt and Adams in the books of Mittleberger & Co.; and permission was given by the agreement to use all monies, which should be so realized, in the firm of John Mittleberger & Co., during the existence of that firm, *without interest*. Merritt and Adams covenant that they will not, during the three years, sell, mortgage, or incur, or render liable to execution for private debt, the mills, or any of the property assigned, without the consent of John Mittleberger, otherwise they *shall forfeit all right to any profits under the agreement*. They covenant further, that, at any time, during the term of years and during the solvency of Mittleberger & Co., upon the agreement of Mittleberger, and exhibition of the books of the firm, they will endorse notes, and accept bills as he may require, together with one George Rykert, to the extent of £12,500, and beyond that sum *without him*, in such sums as J. Mittleberger shall desire, for the use of the firm of J. Mittleberger & Co. In the same agreement, J. Mittleberger covenants that he will pay to Merritt and Adams, during the three years, or during the partnership of J. Mittleberger & Co., the following annual rent, that is to say, "if the whole profits shall be under an average of £2,000 per annum, then the one half of such profits; if the profits shall exceed 2,000 per annum, then the lawful interest on the estimation of the stock invested by Merritt and Adams, and specified in the schedules, and *in addition thereto, the one fourth part of the remaining profits after deducting the said interests.*" J. Mittleberger covenants that he will give a credit to Merritt and Adams together, to the amount of £1,000 in each year, which may be had out of the store of J. Mittleberger & Co., in goods: and he covenants that he will not, so long as the agreement continues, sell, mortgage, or incur his interest in the real property of the pre-existing firms, of Rykert & Co., or of Rykert, Mittleberger & Co., or either of them, *without the consent of Merritt and Adams*, or one of them; except a certain property specified, *which may be converted into available funds for the use of the said firm*. He covenants, further, that, at the expiration, or other sooner determination of the firm of J. Mittleberger & Co., *he will close up the business of the firm, and first pay and discharge all its liabilities*; and will, immediately after, pay over to Merritt and Adams their investments of cash, or stock, in the said new firm, whatever amount may be coming to them, or either of them, according to the schedules, or subsequent receipts and credits; and shall, within three months, pay over to Merritt and Adams whatever balance of accounts, *for rent or otherwise*,

may be due or coming to them or either of them, from the said firm; and will, within the period of three months after the determination of the said co-partnership, or *as soon as received*, pay over to Merritt and Adams any *proportion of rents or profits that may be coming to them*. He covenants, also, that besides insuring the mills, &c., for certain amounts named, *he will, from time to time, insure a sufficient sum upon the produce in the mill, and in the store-house, and on the goods*, and charge the same to the firm of J. Mittleberger & Co. J. Mittleberger further covenants, that he will, from time to time, during the partnership, procure Rykert to indorse negotiable business-paper, *to be used in the firm of J. Mittleberger & Co.*; and also, that in the firm of J. Mittleberger & Co., no one but himself shall have power, *for him*, to contract liabilities or sign the name of the firm, unless empowered under his hand and seal: that he will, twice in each year, balance *the mill and distillery accounts, exhibiting statements of the business thereof*; and once in each year balance the store accounts, shewing an annual statement *of the aggregate business*; that he will exhibit the books at all times, or furnish a balance sheet, *to each of the parties interested*, if required. It is provided, that if the mill shall be burnt, or from any accident its operations be suspended for six months, the said partnership, and the agreement, may be put an end to, if declared by J. Mittleberger and Benham; and if the distillery shall be destroyed, and not replaced in six months, the said partnership, and this agreement, may be put an end to, if declared by Merritt and Adams; and if the shop should be destroyed, Mittleberger should be charged with interest on its estimated value in the schedules. And it is stipulated, that if at any time within the term *it should appear*, that the *united credits* of the several parties do not command *adequate means to carry on the business with profit*, a dissolution shall take place, upon John Mittleberger giving one month's notice *to all parties interested*. J. Mittleberger binds himself to pay to S. Street, Esq., the interest of a mortgage long before given by Merritt and Adams, upon the mills, charging the same to Merritt and Adams, but no part of the principal, out of the funds of the said firm: that in case the available means, by debts, and stock *"of the parties hereto,"* shall not be sufficient to meet the liabilities as they fall due, then quarterly balances of the accounts, on either side, shall be struck, and interest charged thereon: that no permanent improvement shall be made in any part of the property, unless by consent in writing *of all the parties interested*: that an account shall be kept of the business distillery, till the hogs then on hand shall be slaughtered, when the profits of the business from the month of May, can be ascertained, one-half of which profits shall be credited to Rykert, Mittleberger & Co., *and the other half to the new firm of John Mittleberger & Co.*: that all the *real estate* and capital invested, united or accumulating through the business of John Mittleberger & Co., shall be held liable for all losses incurred by the firm: and that, if any property shall be seized upon and sold, which belongs *to one party* to the agreement, under execution for the debts of J. Mittleberger & Co., *the property of the other party shall be held liable*, and the owner pay to the party seized on his proportion of the value of the property sacrificed, according to the relative value of the property of each, including Rykert & Co., and Rykert, Mittleberger & Co. And it is further provided, that if John Mittleberger, in the new firm of John Mittleberger & Co., should sustain losses by the business, exceeding the profits, then the property, real and personal, or shares of property and capital invested by the said Merritt and Adams, *more particularly specified in the schedules annexed*, shall be held to be equally liable with that of J. Mittleberger, including the two other firms of Rykert & Co., and Rykert, Mittleberger & Co., for such losses, in the same proportion as the said John Mittleberger ought to

bear in regard to other property vested in the said new firm or partnership. It is provided, that "the agreement shall determine with the partnership of J. Mittleberger & Co., whenever that event may happen within the three years; that the *co-partnership of John Mittleberger & Co.*, shall cease and determine by the death of either *Merritt* or *Mittleberger*, and the business be finally closed; in which case, the respective owners may, jointly with the surviving parties to the agreement, the said *Rykert*, and the executors or administrators of the deceased party, and the partners, or surviving partners of *John Mittleberger & Co.*, enter into the premises and adjust, settle and close the business." But the death of *Adams*, and *Benham*, or either of them, is not to affect the said business; and the said *John Mittleberger* may continue in his own name, if he sees fit. All debts against *J. Mittleberger & Co.*, for indorsed or security paper, by *Merritt and Adams*, shall stand in the same situation as all other debts against the firm, and be claimed by them as debts by other creditors; and any excess beyond £12,500, for indorsed or security paper, shall be preferred to the claim of *Rykert*, for similar indorsements to the said sum of 12,500*l.*, and such excess shall be first discharged, so as to reduce the liability of *Merritt and Adams*, on such paper, to the same amount as *Rykert's*. And the parties stipulate, "that neither party shall withdraw from the said firm more than 1,000*l.*, annually, viz., *Merritt and Adams* not more than 1,000*l.*, between them, and *Mittleberger and Benham* not exceeding an equal sum annually, from the funds or assets of the firm. *Benham* covenants with *Merritt and Adams*, that he will not sell, or incur, his interest in the real property, or in the assets, of the late firm of *Rykert, Mittleberger & Co.*, or any part thereof, without the consent of *Merritt and Adams*, or either of them; otherwise, he shall forfeit all profits in the said firm. And the parties bind themselves, that at the expiration of the agreement, *Merritt and Adams* will take such materials in and about the grist-mill, as are generally used in such business, that may remain on hand of the present stock, not exceeding £1,000, according to its present estimated value; and that *Mittleberger* will also then receive not less than £1,000 of the present stock of goods (if so much remains on hand), at the prices in the schedule: the remainder of all stock in hand to be then sold, unless otherwise agreed upon. All these parts of the agreement seem to bear, more or less, on the question of partnership, and I believe I have omitted none that do. It is found by the special verdict, that between the time of making this agreement, and its termination, the plaintiffs accepted bills drawn upon them by *John Mittleberger & Co.*, for the accommodation of the company, to a very large amount, which were discounted for the company at the agencies of various banks in Upper Canada, and the proceeds passed into the hands of the company; and that those bills, when they came to maturity, were paid by the acceptors. In relation to these advances, a mortgage was given to the plaintiffs, by *Merritt and Adams*, on 3rd March, 1840, which is set out in the verdict, and will be presently noticed. It is for the balance of accounts due to the plaintiffs, for such advances, and found by the special verdict to amount to £25,918 10*s.* 6*d.*, that the plaintiffs seek in this action to charge the defendants, *Merritt and Mittleberger*, as being both partners in the firm of *Mittleberger & Co.* Besides the evidence upon the question of partnership, which may be collected from the agreement, certain letters are found by the special verdict to have been written and sent by *Merritt* to various persons, which are set out verbatim, and which are relied upon as tending to establish the fact of partnership. The defendant *Merritt* contends that these letters cannot be considered by the court, because a special verdict can only contain facts found, and not mere evidence of facts. No doubt that is a well known principle, and applies universally to special verdicts; but it

does not apply as it has been attempted to apply it. If the jury had found merely that certain evidence was given to them for the purpose of proving that these letters were written by Merritt, or by some one authorised by him, then, however conclusive the proof of the fact might have seemed, we could not have taken these letters as proved, and could not have considered them; but the jury find that these letters were written, and were sent by the defendant Merritt: what they import upon a fair construction of them, and what their contents establish, becomes then matter of law rather than of fact. If, for instance, a question should arise upon a trial, whether an act done by A, for the benefit of B, but without his express authority, was afterwards adopted and ratified by B, and if a letter written by the latter were produced in evidence, it would become the duty of the court to say whether it amounted to an adoption, or not. So, if on a prosecution of several persons for a conspiracy, it were proved that one of them wrote and sent a letter in relation to the object of the conspiracy, it would fall to the court to say, whether the contents of the letter showed such a participation in the design, as to amount to an overt act, implicating the person in the conspiracy. In a case before Lord Ellenborough, at nisi prius, in which letters were written, not by parties in the cause, but by persons who had been acting in the matters which gave rise to the litigation, it was objected that they were mere declarations of parties not on oath, and so not evidence; but Lord Ellenborough observed, (I have not now the case before me, but cite it from memory,) "I think the letters are evidence; I must suppose the parties writing them were rational agents; the letters were written before any dispute about these matters arose; with what intentions the writers acted, is part of the question, and what better evidence can we have of their intentions than their conduct; their writing and sending these letters, was part of their conduct." I think these letters written and sent by Merritt, are facts which we are bound to consider. They must be read through to find how far they are material. It will be seen that in all of them Mr. Merritt identifies himself with the transactions of the firm; the large advances of money were required for carrying on the business of the mills; wheat was to be bought in the United States, and sent to St. Catharines to be manufactured into flour; this occasioned a correspondence with the agent who was to buy the wheat, with forwarders who were to transport the flour, and with bank agents who were to negotiate bills and drafts: and these letters of the defendant Merritt, are on these subjects. He speaks of the business of J. Mittleberger & Co., as our business—"our purchases for the fall," he says, "must be made this week; we have two schooner loads of wheat arrived," &c. To the forwarder, he says, "we are about making large shipments to you; our wheat arrived last week, and the mill is in full operation."\* That he alludes to the mills leased by him is clear, for he says in the same letter, "I have left the management of the mills wholly to John Mittleberger & Co." The letter of the 2nd October, 1839, he wrote to William Mittleberger, who is stated in

\* One of the letters referred to as being set forth in the special verdict, viz:—  
St. Catharines, 24th Sept. 1839.

William Dickenson, Esq.,

SIR,—I have left the management of the mills wholly to John Mittleberger and Co. They promised to send you a good proportion, the greater part as formerly. Your letter of the 20th is at hand. From the personal conversation with yourself and partner, I fully understand the motive which has dictated your letter. My young man should not have noticed it, but I have uniformly told every person no agreement existed this year between us, (at the same time you will find by my letter to John McPherson, a copy of which I send you, without relating to the first of his letter, and which you may keep to yourself, as it is

the verdict to have been an agent of John Mittleberger & Co., employed to buy wheat for them in Cleveland, in terms which shew an intimate knowledge of the business carried on by John Mittleberger & Co., and a personal interest in it. In that letter he seems to reproach the agent for not sending wheat in proportion to the monies which had been sent to him; and it is impossible to read this letter with any other impression than that the monies advanced were advances made by him, and the wheat purchased for him; not for him alone, but in conjunction with the others who composed the firm. "We require," he says, "30,000 bushels of wheat, and what we want you to inform us by Mr. Benham is, what time you can get the quantity." In another letter to the same agent he speaks of the advances of monies made to him, as *our money*; and after urging him to send wheat, he says, "close up all purchases; get in all the wheat, and ascertain what we may obtain it for during the winter, (this is written in October, 1839), if we procure the funds. Write us what you have in all, and when we may expect it, as we fear our mills will be idle again in a few days. Can wheat be purchased by draft on New York at 90 days?" Looking then at these letters written by the defendant Merritt, and at the agreement of 28th August, 1839, we have to determine, 1st, whether he was in fact a partner with John Mittleberger, in the business for which the plaintiffs, by their accommodation acceptances, supplied funds; 2nd, if he was, then, whether there was any thing in the terms of the mortgage given to the plaintiffs on the 3rd March, 1840, which should obstruct the plaintiff's legal resource against him as a partner. Upon the first point, I have to observe that, when the amount in litigation, in any cause, is very large, as it is here, amounting to more than £25,000, every question, upon which the right of the respective parties can be made to depend, become important, in one sense at least, as regards those parties; and the ability and research of counsel, which were conspicuously exerted on both sides, in this case, may very often succeed in giving the appearance of doubt and difficulty to questions, which, in truth, are not in themselves doubtful or difficult. And this, in my opinion, is the case here. If the agent at Cleveland, to whom the defendant, Merritt, wrote the letters referred to, having purchased, in the United States, large quantities of wheat, avowedly for J. Mittleberger and Co., had failed to pay for it, so that the sellers were obliged to proceed against his principals, if Mr. Merritt, being sued in such an action, had denied that he was liable as a partner, and upon the trial these letters had been produced, and nothing more had appeared, it cannot be doubted that the jury would have been directed, at once, to find for the plaintiffs. I see verdicts constantly rendered against parties who deny their liability as partners, upon evidence much less clear and positive. Then, as to the agreement it seems to involve in it every ingredient of a partnership among the four who were parties to it: joint contribution of funds; participation of all in the general profits; a common liability to loss; a periodical exhibition of accounts; a general accountability among themselves; and a final adjustment, according to the property of each, has been taken into account, in the joint dealing. It is quite true, that in the agreement

merely to assure you I have not told any person an agreement existed,) therefore you may rest satisfied nothing further can transpire to militate against your combination. We get the 6d. abatement from all; no agreement, but understood; and if you are not satisfied to let things remain as they are, let me know immediately, as we are about making large shipments to you. Our wheat arrived last week, and the mill is in full operation.

Yours, &c.

W. H. MERRITT.

the firm is spoken of as consisting of J. Mittleberger and Benham, alone; but I take it to be equally clear, that if, in any such agreement all the parties in the most express form of words that could be used, declared that those two alone should compose the firm, and had added that those two alone should be liable as partners to third parties, but yet had gone on, in the same agreement (however absurdly it might have seemed), to constitute in fact a partnership in the eye of the law, by providing for a common participation of the profits, and a common liability to losses, the rights of third parties, dealing with them, would have depended, not on what they might have said as to who should be the partners, but upon what they had *done* by that agreement, or afterwards, to make some or the whole of them partners in fact.— If by law they would be partners, acting as they did, then the only effect of their declaring that Mittleberger and Benham should compose the firm, would be, that they might be regarded as the name in which the whole traded. It is needless to inquire what substantial effect it could have inter se; as to third parties no such provision in their own contract can except any party from the liability, who ought to be held liable upon the actual mode of dealing.— This is no such case as that of *Emly et. al. v. Lye et. al.* where the party *discounting a bill* drawn by one member of a firm, in his own name only, as a third party sought to make the partners of the drawer liable, though the bill was not drawn in the name of the firm, on the ground that the money went in the partnership account. There the court held, that the person discounting the bill had no pretence for following the funds into whatever hands they came, for that they had discounted the paper on the credit of the parties to it, and had no remedy except on the security. To have held otherwise would have introduced great confusion into mercantile transactions. But here the plaintiffs advanced the monies upon bills drawn on them by J. Mittleberger and Co.; they accepted for their accommodation, and lent their money to them; and the only question is, who are comprehended in the firm of J. Mittleberger and Co. ? for all who are, are clearly the borrowers of the money. Now, how can it be denied, upon the face of the agreement alone, that the monies, which were advanced for buying wheat to be made into flour at the mills, went to carry on a business in which Merritt and Adams had a joint interest as partners. It may have been imagined, that a sort of qualified or limited partnership could be constructed, such as would give to Merritt and Adams all the chance of profit out of the business, without making them subject to the debts incurred in it. It would seem that both in the agreement and in the letters such an idea was sometimes present, though it was at other times lost sight of. But the point that all four were partners, is, in my opinion, too clear for argument. It would be tedious to cite all the proofs of a partnership afforded by the agreement; they are irresistible, and it is unnecessary to cite authorities for what admits, as I think, of no dispute. The various authorities cited are in cases where the palpable, direct arguments, which of themselves go to constitute a partnership, were wanting, and where some one or more collateral circumstances relied upon, and these, though material, were sought to be explained away, or were counteracted by something that made them inconclusive: but, here the four were in fact partners, by their agreement, that is by its expositions in many parts of it, and by its effects on the whole. There can, in my opinion, be no question raised, unless there is ground for it in the particular character of the transaction between these plaintiffs and Merritt, which led to their giving accommodation to J. Mittleberger and Co.—I refer now to the mortgage of 3rd March, 1840. I see nothing in that that can control the liability of every member of the firm of J. Mittleberger and Co.; it refers to the agreement of 28th August, 1839; and

though it recites but a small part of it, I must infer, unless the contrary were shewn, that its contents were known to all. Then, if so, while these plaintiffs knew that, among themselves, the parties had agreed to call J. Mittleberger and Benham the firm, they also knew, on the other hand, that the monies which they were about to advance, were to be applied in carrying on a business, of which the whole four were to share the profits, and were to be liable to the losses; in which they were to be mutually accountable during the progress, and at the end of the business; in which they all had stock invested; and of which an account was to be finally taken and adjusted among all at the conclusion. To be sure, it is stated that before Merritt and Adams were to receive their share of the profits, all the debts of the firm should be paid; but that must be presumed to be the principle and intention of all partnerships, however indifferently it may be observed sometimes. Then, knowing these facts at the time, or afterwards discovering them, how could the plaintiffs imagine, that when they accepted bills drawn on them by J. Mittleberger and Co., they were not to have the liability of all, who, upon the well known principle of mercantile law, must be held to be included in the firm. They could not suppose that any one could stand in that situation that he could make almost a fortune, out of money advances by them, from the profits of a business carried on with it, and yet be exempt from contributing to its payment. The many stipulations, in the agreement of August, 1839, intended for the protection of all four, and particularly those regarding the dissolution of the firm, on Merritt's death, (though it was not to be dissolved on Benham's death), are consistent with the idea of a co-partnership, and with no other state of facts; and so the defendant, Merritt, seems clearly to have understood, from his letters. It need hardly be stated, that the fact of Merritt having given a mortgage upon some of his lands, to what value is not ascertained, towards securing the plaintiffs, in their acceptances for J. Mittleberger and Co., can never be held to deprive the plaintiffs of the full benefit of their recourse upon all who are in fact liable upon their acceptances. I see no reason for holding the sum of 2,293*l.* 17*s.* 11*d.*, as otherwise than part of the partnership dealing; it was money lent to J. Mittleberger and Co., and was applied by them in purchasing produce, no matter of what kind, which went into the hands of the plaintiffs, and relieved all the partners of the firm, pro tanto, by discharging so much of the general account, on which all were liable. I am therefore of opinion, that the plaintiffs should recover the sum of 25,918*l.* 10*s.* 6*d.*

By JUSTICE JONES.—The amount involved in the question to be determined is large for this country, and although the case occupied much time, and was ably and ingeniously argued on the part of the defendants, I cannot see much difficulty in the decision. The agreement of the 28th August, 1839, so far as it relates to the question of partnership, is in substance this; Merritt and Adams leased to John Mittleberger, the St. Catharines mill, and other real property, for three years; and Mittleberger and Benham in the name of John Mittleberger and Co., agreed to carry on, for three years, the milling business, which had previously been conducted by Merritt, the business which had been previously carried on by George Rykert and John Mittleberger, in the name of George Rykert & Co., also the business of distillers, previously carried on by Rykert, Benham and Mittleberger, under the name, style and firm of Rykert, Mittleberger & Co. With the mills, Merritt and Adams transferred all the stock and effect appertaining to the mill, also the debts due the establishment, and the use of a schooner, according to a schedule annexed to the agreement, and covenanted, amongst other things, not to discharge any of the debts, so transferred, under the penalty of forfeiture of any right to profits under the agreement. Mittleberger

covenanted to pay Merritt and Adams an annual rent, as follows: "If the whole profits shall be under an average of 2,000*l.* per annum, then, and in such case, the one half of such profits; and if the whole profits shall exceed 2,000*l.* per annum, then and in such case, the lawful interest on the estimation of stock *invested* by the said Merritt and Adams, and specified in the schedule annexed; and, in addition thereto, the one-fourth part of the remaining profits after deducting the said interest." Also, to give an annual advance of goods to Merritt and Adams if required, of 1,000*l.*; to close up the business at the end of the partnership of John Mittleberger & Co., and first, to pay and discharge all its liabilities; to pay over to Merritt and Adams, their investments of cash, and stock in the new firm, and, within the period of three months after the determination of the said co-partnership, or as soon as received, to pay over to the said Merritt and Adams, any proportion of rents or *profits* that may be remaining to them. Mittleberger further covenants to insure the produce in the mill and store-house, and also the goods; also, once in each year to balance the other accounts, shewing an annual statement of the aggregate business, to exhibit the books at all times, or furnish a balance sheet to each of the parties interested, if required. It was further mutually agreed, that at the expiration of the term, Merritt and Adams should take back the materials about the mill, to the amount of 1,000*l.*, and that Mittleberger should take back goods, wares and merchandize, to a like sum; the remainder of all stock whatsoever to be then disposed of. The circumstance, that Merritt and Adams were to indorse for the firm, was strongly relied upon in the argument, to shew that their liability in the business was to be limited by such endorsements. I do not so view it. In order to carry on the extensive business contemplated by the parties, large advances and credits would be required from the banks, by the discount of drafts or notes; and the security of parties, supposed to be unconnected with the business, is usually required on such paper, in Upper Canada. If, therefore, Merritt and Adams had been known to be partners in the firm of John Mittleberger & Co., their indorsations would not, of course, have been considered as any additional security upon the paper of the firm; and to this, I think, may be attributed their desire not to be regarded, by the public, as connected with the business of John Mittleberger & Co., their names not appearing in the firm. There is, by this agreement, a participation in the ultimate profits, by all the parties concerned; although the business was to be conducted in the name of John Mittleberger & Co., the names of the other parties not appearing; and although a sum was agreed to be paid as rent, it was to be ascertained by the actual profits upon the whole business, and the amount depended entirely upon such profits. I cannot but regard the business to be carried on under the agreement, as a partnership business between all the parties, and I do not see how any person can read the agreement without coming at once to the same conclusion. If anything else were required, the way in which Mr. Merritt seemed to consider it, by his letters, would remove all doubt. On the argument, a great number of authorities were cited, on both sides. I will refer to one more, *Wightman v. Townroe* et. al. where it was decided, that executors were personally liable as partners, when they carried on business with the partners of the testator, in the names of the surviving partners, under the old firm, for the sole benefit of the testator's infant daughter. The counsel who contended against the liability of the executors, insisted that "that there were only two ways by which a person can be made liable as a partner; first by beneficially participating in the profits, in which case, it must be admitted, he will be liable, although he does not appear to the world as a partner. Secondly, by holding himself out to the world as a partner, and then he will be liable, although he does not ap-

pear to the world as a partner." Here the defendants participated in the profits and this alone made them partners inter se, and with all the world. In *Waugh v. Carver* cited in the argument, Lord Chief Justice Eyre says the parties did not intend to become partners according to their agreement. But the question is, *whether they have not by parts of their agreement*, constituted themselves partners in respect to other persons. And that the defendants have done so, in this case, I have no doubt.

By JUSTICE McLEAN.—It seems to me impossible to read the agreement referred to, without discovering, in almost every part of it, the clearest evidence of partnership between William Hamilton Merritt, George Adams, John Mittleberger, and Beacher Banham. By it they are severally to share in the profits and losses, during a certain period, and the joint credit of all the parties was to be used to procure funds to carry on the business. The death of Merritt or Mittleberger, was to operate as a dissolution of the connection; and, in several parts, the establishment of a co-partnership is expressly recognized. It appears therefore clear to me, that Merritt and Mittleberger are liable, in this action, as co-partners with Adams (now deceased) and Benham, who has left the province. As partners they must be responsible for all sums due by the firm of J. Mittleberger & Co., though the debts may have been contracted in business not precisely within the scope of the original agreement. The plaintiffs, when they advanced their money to the firm, could not interfere with its application, and it matters not to them, whether it was used in the purchase of wheat, to be ground into flour, or in the purchase of American flour, or other produce, to be transmitted to them for sale; the application was a matter which rested with the partners of the firm, but their joint liability could not be affected by any matter of that kind. Under the full conviction that the agreement establishes a partnership between the defendants, I cannot, of course, see any reason or ground why the plaintiffs should not retain their verdict, and enter their judgment for the whole amount found to be in arrear by the firm of John Mittleberger & Co.

Judgment for plaintiffs.